IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 21 of 1958

NATHANIEL STUART CHALMERS Appellant

v.

REGINA Respondent

Wounding with intent to do grievous harm, section 250 of the Penal Code. Submission of no case to answer at close of prosecution case—" intent " not then proved—Magistrate found case to answer, accused went on to his defence and was convicted. Defence refused statements made to Police Officers by witnesses for the prosecution—duty of prosecution: right of prosecutor to withdraw an application for a preliminary inquiry s.s. 210, 213, C.P.C.

Held.—(1) If a submission of " no case to answer " is made by an accused person and it is wrongly rejected by the court the accused can be convicted, even when there was " no case ", if evidence in his defence makes up the deficiency in the prosecution case.

(2) As soon as it becomes apparent that a witness for the prosecution is giving evidence which conflicts with a written statement to the Police by that witness, a moral duty rests on the prosecution to make such statement available to the defence.

(3) A prosecutor who has made an application for a preliminary inquiry to be held can withdraw that application at any time before the trial commences.

(4) When the submission was made there was no case to answer as the prosecution had not proved intent.

(5) Nothing in the defence provided evidence of intent and the accused was not prejudiced by having entered upon his defence.

Appeal allowed.

Cases referred to:—

Rex v. Abbot (1955), 2 Q.B. 487.

Rex v. Pearson (1908), 1 C.A.R. 79.

Rex v. George (1908), 1 C.A.R. 168.

Rex v. Fraser (1912), 7 C.A.R. 99.

Rex v. Joiner (1910), 4 C.A.R. 64.

Rex v. Power (1919), 1 K.B. 572.

LOWE, C.J., [22nd July, 1958]—

The appellant was convicted, by the then learned Magistrate at Sigatoka, of an offence of causing grievous harm by unlawful wounding, contrary to section 250 (*a*) of the Penal Code.

The particulars of the offence were stated to be that the appellant, on the 14th February, 1958, at Korotoga, Nadroga, in the Western District, with intent to do grievous harm to Taraivina Lewatu did unlawfully wound the said Taraivina Lewatu by discharging a firearm at her.

The appellant was sentenced to six months imprisonment. He appealed against his conviction and sentence in a long petition and subsequently gave notice that he intended to move this Court for leave to file additional grounds of appeal. The first of those grounds I have no need to refer to but the second ground was:

> " That the Police prosecutor applied to the court that the said charge be tried at the Supreme Court, and your Petitioner submits, that by reason of sections 210 and 213 of the Criminal Procedure Code, the learned Magistrate had no jurisdiction to try your Petitioner and that therefore the said trial was a nullity."

I did not grant leave to add that particular ground.

Section 210 is as follows:

> " If before or during the course of a trial before a Magistrate's court it appears to the Magistrate that the case is one which ought to be tried by the Supreme Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the Magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained. . . ."

Section 213 says:

> " Whenever any charge has been brought against any person of an offence not triable by a Magistrate's court or as to which the Magistrate is of opinion that it ought to be tried by the Supreme Court or where an application in that behalf has been made by a public prosecutor a preliminary inquiry shall be held, according to the provisions hereinafter contained, by a Magistrate's court, locally and otherwise competent."

When the court assembled and the accused appeared on 19th February, 1958, the prosecutor asked the court to conduct a preliminary inquiry. The appellant was then on bail and the Magistrate extended that bail and adjourned the case until 28th February. When the court again assembled on that date the public prosecutor said that he had been instructed to ask for a summary trial. The accused was then asked to elect whether he wished to be tried by the Magistrate's court or whether he wished his trial to take place before the Supreme Court, and he elected trial in the lower court. Up to that stage he had not been asked to plead.

It will be seen that the effective words in section 210 are " If before the commencement of a trial an application in that behalf is made by a public prosecutor . . ". and in section 213: " Whenever any charge has been brought . . . ". Those words relate to the latter portion of section 213 which says: " or as to which the Magistrate is of opinion " and " where an application in that behalf has been made by a public prosecutor ". The section does not disclose a model of law drafting.

In the instant case no charge had been actually brought against the appellant and as, in the order of events, the public prosecutor had withdrawn his application for a preliminary inquiry and had substituted an application for a summary trial there was then no application for the inquiry before the court prior to the commencement of the case and it follows the only application by the public prosecutor at the stages prior to and after the appellant had pleaded to the charge was for trial by the Magistrate.

I am in no doubt that a prosecutor can lawfully withdraw a prior application, made by him, before an accused is charged with an offence.

I allowed the appeal and ordered the acquittal of the appellant thereby quashing the conviction and setting aside the sentence which had been imposed by the learned Magistrate. I now give my reasons for so doing.

Section 250 of the Penal Code, in that portion which is applicable to this case, is as follows:

> " Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—
>
> (*a*) unlawfully wounds or does any grievous harm to any person by any means whatever; "

At the end of the case for the prosecution Counsel for the appellant submitted to the court that there was no case to answer. He said, *inter alia*, that there was " no evidence that the accused intended to do grievous harm ". The learned Magistrate said: " As to intent—evidence that gun pointed and fired. Intent presumed. Case to answer." That decision seems to have been given *ad hoc*. If the prosecution had at that stage failed to prove intent there was certainly no case to answer and it was the duty of the Magistrate to analyse the evidence most carefully in order to satisfy himself as to the required proof. He did not do so; in fact he made no analysis of the evidence whatsoever, *ad hoc* or otherwise. In the *Criminal Law Review* of April, 1958, 232 a learned author deals with question of " no case to answer ". During the course of his article he says:

> " The duty of a trial Judge to withdraw a case from the jury differs according as to whether a submission of ' no case ' is made or not. If such a submission is made, then the Judge *must* withdraw the case unless there is evidence to go to the jury. If, however, no submission is made, the trial Judge *may* withdraw the case, but he is not necessarily bound to do so."

He then goes on to deal with the effect of the refusal to withdraw the case, where no case is disclosed, and says:

> " In many cases a conviction of the hearing after the trial Judge's refusal to withdraw the case will merely result in the acquittal of the prisoner. If there was no case to go to the jury, then, theoretically, the defence need adduce no evidence. Even if evidence is adduced, it will normally serve only to strengthen the case for the accused. In two situations, however, it may well be that a continuation of the hearing will prove prejudicial to the accused. Where there is doubt as to whether the prosecution has made out a case or not, or where it is deemed preferable to press for an immediate acquittal rather than to proceed on appeal, the prisoner may elect to give evidence. In this case, cross-examination may prejudice him, by bringing to light evidence not available to the prosecution in their case, but damning to the prisoner.

Also, where there is a joint indictment of two or more offenders, the defence of one may operate as an attack on the other. Should either of these two things happen, the jury may well bring in a verdict of guilty."

Later he says:

"The fact that there is no case to go to the jury may be a matter of law. Whether a verdict is unreasonable or not having regard to the evidence raises, however, a question of fact."

In the instant case the learned Magistrate had to decide whether or not there was sufficient evidence of intent, express or implied from the prosecution case before he could determine whether or not Defence Counsel's submission should be upheld.

In *R. v. Abbott* (1955), 2 Q.B. 497, the Lord Chief Justice said:

"Here we have a question whether or not there was a right decision in point of law by the Judge. In our opinion the Judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant, Abbott, and therefore he was wrong in law in giving the decision he did."

The learned author goes on to say:

"But it is important to remember that in *R. v. Abbott* there had been a submission by Counsel of 'no case to answer'. and this had been rejected by the trial Judge. Where a submission is actually made at the trial the Judge is bound to withdraw, and a failure to do so is thus failure to fulfil a legal duty. The position may well be otherwise where there is not a legal duty to stop the case, but merely a discretion to do so, as is the case where no actual submission is made. It follows that if there is no legal duty, there is no breach of duty, and hence no point of law involved."

At the trial of the appellant, the learned Magistrate was under a legal duty to reject the prosecution's case if he found there was no intent proved but, instead, he rejected the submission of Counsel for the defence. This raises the question as to whether or not this Court can have regard to evidence received at the trial after the close of the case for the prosecution. In *R. v. Pearson* (1908), 1 C.A.R. 79, Lord Alverstone, C.J., said, *obiter*:

"If the evidence for the defence supported what was wanting the Court would not interfere",

and in *R. v. George* (1908), 1 C.A.R. 168, Channell J., said:

"If no submission is made and the prisoner goes on to make statements which supply evidence against him, he may be rightly convicted."

It must be noted, however, that in both of those cases no submission had been made to the Court at the end of the prosecution case. In *R. v. Fraser* (1912), 7 C.A.R. 99, a submission had been made and refused and the accused went on with his defence, calling evidence which, in the event, proved prejudicial to him. He was convicted and appealed. The Court's judgment was delivered by Lord Alverstone, C.J., and in the course of it he said:

"Where an objection is taken by Counsel unsuccessfully and he then calls evidence, this Court is not bound to disregard the effect of that evidence. . . . At present the Court is not prepared to follow *R. v. Joiner*, but prefers the reasoning in the other two cases." (*R. v. Pearson* and *R. v. George*).

In *R. v. Joiner* (1910), 4 C.A.R., 64, Darling J., had said:

> " We are of opinion that it was the duty of the Chairman to withdraw the case from the jury, and we have no right to say otherwise, even if anything adverse to the appellant was elicited afterwards. Therefore, we take no notice as to what happened afterwards."

This is the *dictum* which was disapproved in *R. v. Fraser*. In another case, *R. v. Power* (1919), 1 K.B., 572, the Court considered that the law was correctly stated in *R. v. Fraser*, and Darling J., who it will be noted had expressed an apparently opposite *dictum* in *R. v. Joiner*, said in the course of his judgment in the *Power* case:

> " This Court agrees that Lord Alverstone's statement of the law was accurate, and that the judgment in *R. v. Joiner* did not put the matter properly."

This is also *obiter dictum*. The learned author to whom I have referred expresses the opinion that the law in this respect is not yet settled but, with respect, I consider that the *dictum* of Darling J., to which I have just referred, amounts to an express approval of the correct enunciation of the law by Lord Alverstone, C.J.

The position in the instant case is as follows: Counsel for the appellant made a submission of " no case to answer " and that submission was rejected. Even if it is found that there was in fact no case to answer at the end of the prosecution case the accused, by his action in going on to his defence and calling evidence, voluntarily took the risk of giving evidence and submitting to cross-examination. That could have proved prejudicial to him and have justified a conviction, in spite of the fact that the learned Magistrate might have erred in law in misdirecting himself that there was in fact a case to answer although in the instant case it would appear to be a case of non-direction.

At the trial, Taraivina Lewatu, the complainant, gave evidence and explained that she had been employed by the appellant since 1949. She had received a cheque from him for £50, apparently on the 12th of February, and had cashed that cheque. After having done so she returned to the appellant's house where some conversation took place about her having her lunch. She claimed that she was told to go and search for a place for lunch, implying that the appellant was showing anger at her presence. The allegation of the prosecution was that the appellant had given her £50 as a final payment for her services in order to ensure that she left his premises altogether. There is evidence to support this but all of such evidence merely shows a state of mind and, although it might in some circumstances support an allegation of intent it is not sufficient alone to prove that fact. It was on February the 14th that the complainant was wounded in the foot. She spoke of the appellant being in a high temper and later in her evidence she said:

> " I knew he was intending to clear me from the house."

and later she said she moved down to the " little hut " which the evidence seems to indicate was the toilet. She looked at the appellant and saw that he had a gun so she did not look any more at him but ran forwards away from the appellant. She said also, in apparent conflict, that the gun was pointed at her for five minutes. She described how an Indian was working close by but did not say anything; merely went to take the gun away from the appellant after she had been wounded. Later she said that the appellant could hear what the Indian said and then she spoke in Hindi saying:

" Look out the Sahib is coming with a gun."

There is complete conflict in evidence of the complainant. The appellant has always claimed that the wounding of the complainant was an accident. He claimed that he was out trying to shoot a white rooster which had been causing trouble amongst the fowls which he kept. The complainant said there was no white cockerel out that morning.

The complainant was challenged in cross-examination and asked whether or not she was putting forward her story in order to obtain money from the appellant and she said:

" It is true, I have told this in court in the hope that I would get some money out of Mr. Chalmers."

She denied that Mr. Chalmers had been in the habit of shooting roosters which were worrying the hens, but when asked to write the words " old man killed a rooster " she did so in English and was later shown a diary in which there was writing in her own hand saying " old man killed a rooster ". She admitted that that must be correct and that he did kill a rooster, but she went on to allege that he had done it with a cane knife. It seems clear that she was prevaricating at this stage. When Counsel for the appellant pressed the complainant again about getting money out of the case the learned Magistrate intervened, " Of course she expects to. If an injured person cannot get compensation for actions of crime or negligence, there is something wrong." That interjection was unjustified because the purpose of her endeavouring to claim money from the appellant had not, at that stage, been disclosed and her credibility had become suspect.

She denied that she had said to the appellant after she had been shot:

" Don't worry old man. It is my fault."

But the girl who was with her at the time said that she heard the complainant use those words. In other words it is clear that the complainant, immediately after she was shot, took the blame for what she must have considered then to have been an accident. This does not agree in any way with the evidence she gave. It is clear that she was lying as it is, indeed, with the witness Salima. In these circumstances the Magistrate was not justified in considering their evidence at all, particularly as it had been demonstrated to him that the accused was holding the shotgun in a position described by the Magistrate as being at the port. Had the learned Magistrate not refused the initial application of the prosecution to proceed on a different charge, the result might well have been different and the prosecution would certainly have been more content. If the Magistrate had rejected the evidence of Salima and Lewatu there was nothing left against the appellant except the evidence of the Indian who was said to have been present at the time. But his evidence is also in conflict with that of Lewatu. I do not need to deal with it in any detail but with such unsatisfactory evidence the Magistrate certainly was not in any position to find that the appellant's intention to wound the complainant had been proved by the prosecution. It certainly had not by the end of the prosecution case. The appellant gave evidence but there was nothing in that evidence which conflicted with the story he had maintained and which had become disclosed by cross-examination. Even if he was angry at the time the gun was discharged that does not show any intent to do grievous harm or to wound Lewatu and even if he had in fact wanted to terminate her services that proves nothing conclusive. There is much more evidence from the prosecution which is in fact in favour of the defence, but I do not find it necessary to refer to it.

I can find nothing in the defence case which is so prejudicial to the appellant that he should have had a conviction entered against him. Throughout the whole trial there is no reliable evidence to show that he intended to wound Lewatu. In fact the evidence discloses a reasonable inference that the shots from the appellant's gun entered the foot of the complainant after striking the ground nearby. Medical evidence described the position of the wound and shows the impossibility of the evidence of Salima to the effect that Lewatu was backing away from the appellant when the appellant fired.

The only other point with which I need deal is that contained in ground **3** (*p*) of the Petition of Appeal to the effect that the defence applied in writing to the prosecution for the written statements given to the Police by the witnesses in connexion with the incident. The prosecution refused to allow the perusal of such statements which fact Counsel for the defence claimed had been prejudicial to his case and had possibly caused a substantial miscarriage of justice. The principle to be followed in such matters is well settled. If the prosecution have in their possession statements made to the Police by any witnesses who give evidence on behalf of the prosecution and it is shown when that evidence is being adduced that it is in conflict with any such statement there is a moral obligation on the prosecutor to hand the particular statement to Counsel for the defence to enable him to cross-examine the witness as to the discrepancies and so challenge his credibility. It is no duty of the prosecution to press for a conviction in any event and certainly there should be no question of seeking a conviction when the evidence given by the prosecution's own witnesses is in conflict in material respects with any statements given by such witnesses to the Police. I would make it clear, however, that there is no legal duty on the prosecution to hand over any such statements but, as I have said, it is a moral duty which should never be lost sight of.

For the reasons I have given I allowed this appeal.